TABLE OF CASES.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1948.

No. 513.

BURNHAM CHEMICAL COMPANY, a corporation, *Petitioner*,

v.

BORAX CONSOLIDATED LTD., a corporation, PACIFIC COAST BORAX COMPANY, a corporation, UNITED STATES BORAX COMPANY, a corporation, and AMERICAN POTASH AND CHEMICAL CORPORATION, *Respondents*.

MEMORANDUM IN ANSWER TO BRIEFS FOR RESPONDENTS BORAX CONSOLIDATED, LTD., ET AL., AND AMERICAN POTASH AND CHEMICAL CORPORATION IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

TO THE HONORABLE THE CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

As an answer to the briefs filed by Borax Consolidated, Ltd., et al. and American Potash and Chemical Corporation, the Court is asked to review the Petition for a Writ of Certiorari. The two briefs, supplementing each other,

are beset with infirmities. They lack a frame of reference in the complaint, fail to relate the legal issues to the cause of action, recite as the law propositions which are in dispute, set down as facts matters which have not been tried and infuse into the cases they cite a meaning which is not there. They overlook the axiom that holdings are to be read in the light of the concrete situations before the court. Above all, they fail to join issue on the questions raised in the petition for a writ of certiorari. Their ventures into irrelevance and the needless multiplication of issues make this answer to the respondents longer than we should like.

I. The Fundamental Error and the Facts.

1. The Fundamental Error.—This action is a private suit for triple damages under the antitrust laws. The Federal District Court, instead of sending the case to trial on the merits, isolated the issue of the statute of limitations from the course of alleged illegal conduct in which it was set, and upon it as so isolated ordered and held a special trial.

In their answers Borax Consolidated (Br. p. 4) and American Potash (Br. p. 5) insist that, since they have not formally answered the complaint, they have neither admitted nor denied the charges therein. If their contentions be accepted as valid, it follows as of course that the frame of relevance in respect to the statute of limitation is the series of allegations in the complaint. The proper question was, "is such a cause of action as is set forth in the allegations of the complaint barred by the statute of limitations?" It would require little short of a full trial to measure all the relevant allegations against the facts; not, for example the statement of Borax Consolidated (Br. p. 2) that no act of the respondents barred the return of Burnham Chemical to the industry. But antecedent to putting the case to the proof—with the allegations neither affirmed nor denied—the court could not go further than to ask whether the statute had run against the cause of action as alleged. Yet the court, in instituting a

special trial, sought—and did—pass upon the statute of limitations apart from a verified knowledge of the facts which alone could give its judgment validity.

The "special trial" was by the presiding judge limited to and predicated upon a single issue, and the finding of facts and the conclusions of law announced by the trial judge stand or fall as that question was properly or improperly put. The trial judge submitted to the jury—which he dismissed before it could return an answer—the issue as:

> "At any time from May 17, 1929 to October 10, 1939 did plaintiff know or have good cause to believe that its business had been theretofore damaged by acts of the defendants in violation of the Anti-Trust Laws of the United States?"

Petitioner strongly objected to the form of the question, insisting that knowledge of its injury and "cause to believe" that it was due to violation of the antitrust laws by the respondents was not enough. Petitioner contended that the question should have been framed in terms of knowledge of the conspiracy and knowledge adequate to institute a cause of action. (See discussion below, pp. 4, 5.) Such a rewording of the question was rejected by the trial court; the refusal to reword was set forth as error to the Court of Appeals; and in its opinion the Court of Appeals ignored this question entirely.

2. The Two Ways of Putting the Question.—Here is the fundamental error; and from this error numerous misstatements and false inferences in the adverse briefs proceed. Both Borax Consolidated (Br. pp. 5, 7-9) and American Potash (Br. p. 5) recite facts to the effect that the petitioner did know of its injury within the period specified and at times did have reason to believe that it was due to violations of the antitrust laws by the respondents. All of this is readily admitted by petitioner; nor is there a word to the contrary either in the complaint or in the testimony

of Mr. Burnham. But petitioner contends that knowledge of his injury, and good reason to believe that the respondents were responsible, was not enough. It contends that to formulate a complaint which would stick in court it had to have knowledge of the conspiracy and be able to specify its cause of action. If petitioner is right, all the allegations of knowledge and good cause to believe as set forth by Borax Consolidated and American Potash fall as irrelevant. And the facts found by the District Court have validity only within the narrow limits of the question as put.

3. WHICH WAY OF PUTTING THE QUESTION IS VALID?—Knowledge, cause to believe, or discovery has importance, not in itself but for a purpose. No amount of belief will give shape to the lean and concrete lines of a complaint. If it is to do the suitor any good, knowledge must be of a kind—and there must be enough of it—to support a complaint which is proof against a motion to dismiss. It is true as the adverse parties state that in order to go to court, a litigant does not have to know his whole case. And they are entirely right in saying that interrogatories, depositions and other methods of discovery are open to him. (Borax Consolidated Brief, p. 17.) But such aids to building his case are available to the litigant only after his cause of action has withstood a motion to dismiss; and for that a knowledge of the conspiracy and the outline of the cause of action is essential.

The courts are clear-cut on the kind of a complaint which must be presented and which is proof against a motion to dismiss in an antitrust case. As in *Alexander Milburn Co.* v. *Union Carbide and Carbon Corp.*, 15 F. (2d) 678 (cert. denied 273 U. S. 757), Judge John J. Parker puts it:

> ". . . it is not sufficient that the declaration be framed in the words of the statute, or that it allege mere conclusions of the pleader. It must describe with definiteness and certainty the combination or conspiracy relied on, as well as the acts done which resulted in damage to plaintiff, and in doing so, must set

forth the substance of the agreement in restraint of trade, or the plan or scheme of the conspiracy, or the facts constituting the attempt to monopolize."

See also *Rice* v. *Standard Oil Co.*, 134 F. 464; *Tilden* v. *Quaker Oats Co.*, 1 F. (2d) 160; *Glenn Coal Co.* v. *Dickinson Fuel Co.*, 72 F. (2d) 885, 887-8, and cases cited there.

It is submitted that on the basis of the "knowledge and good cause to believe" which the District Court held to be sufficient, petitioner could not recite "with definiteness and certainty the conspiracy" of which it now complains. Nor was petitioner able to "set forth the substance of the agreement . . . or the plan or scheme of the conspiracy, or the facts constituting the attempt to monopolize" at any time prior to the discovery in 1944 of the basic agreement between Borax Consolidated and American Potash and of the file of documents giving a circumstantial account of the formation and execution of the conspiracy. See also the discussion of *American Tobacco Co.* v. *Peoples Tobacco Co.*, 204 Fed. 58, at pp. 8-9 below.

II. Errors and Confusion in Respect to the Law.

1. The Form of the Question.—If it was at all proper for the District Court to raise the issue of discovery, it is submitted that for the reasons just cited, that question was improperly put. If discovery has any function to perform, it is the discovery of fact enough in respect to the plan or scheme of the conspiracy and the acts through which it was executed, to sustain an acceptable complaint.

2. The Failure of Respondents to Meet Legal Issues.—A careful comparison of the briefs of Borax Consolidated and American Potash with the Petition for a Writ of Certiorari will make it clear that issues raised have not been met. In fact, the adverse arguments are addressed not to the instant petition but to a hypothetical document. Thus it is argued:

A. That petitioner denies that state statutes are, or should be, employed in antitrust cases. The petitioner makes no such denial. Like the substantive provisions of the antitrust acts, the statutes of limitations belong to a system of law. In a case of consequence involving a number of issues, legal values come into conflict. It is in fact the function of judgment to resolve these conflicts. In the resolution it is important that the principal of the limitation of action be given its proper weight. To the plaintiff should be accorded no incentive to sleep on his rights; and the defendant should be saved from having to answer after the case grows cold. But the federal right takes precedence over the state device employed to instrument it. Alien importations into the federal law must be held to their instrumental place. Cases such as *Bluefields S. S. Co.* v. *United Fruit Co.*, 243 Fed. 1; *Stout* v. *United Shoe Machinery Co.*, 208 Fed. 646; *Midwest Theatre Co.* v. *Cooperative Theatres*, 43 F. Supp. 216; *Leonard* v. *Socony Vacuum Oil Co.*, 42 F. Supp. 369. *Twin Ports Oil Co.* v. *Pure Oil Co.*, 46 F. Supp. 149, and others cited by Borax Consolidated (Br. p. 19), may properly attest the legitimate use of state statutes in matters concerned with the vindication of federal rights. But no one of them can be made to sanction the conversion of a privilege accorded the defendant into an immunity to the law.

B. That petitioner seeks to establish for itself "a privilege denied to plaintiffs in other actions" and to create "a distinct class of actions subject to no limitations whatever." Again petitioner seeks nothing of the kind. It contends—as it did in its Petition—that a limitation on the time within which actions are to be brought is a salutary device. (Borax Consolidated, Br. 19-20.) But it insists that the use of the device is to be shaped by the rationale which sustains it. It is intended neither to strip the litigant who has been diligent of his rights, nor to confer immunity upon the person who for a fixed period successfully conceals his violation of the law. Its argument is neither

for a special rule in antitrust cases nor for "a class of actions subject to no limitation." Its insistence is that, whatever the class of actions, the rule on limitation should serve the purpose which brought it into being and should not become an iron-clad requirement ritualistically to be invoked to nullify a law or to deny a right.

C. That petitioner demands that this court usurp the functions of the Congress and write into the antitrust laws a statute of limitations. (American Potash Brief, pp. 7-10.) The petitioner demands nothing of the kind. The petitioner insists that the state statutes, which are no part of the acts and were never intended for such a use, are flexible guides which should be used to realize and not to frustrate the statutes which they are called into play to implement. A federal statute, with a rigid period of time within which an action must be commenced, would be no answer to the question addressed to this Court. In the common law the rule against restraints was subject to the rule of reason. Mr. Justice Holmes, dissenting in *Northern Securities Co.* v. *U. S.*, 193 U. S. 197. And ever since *Standard Oil Co. of N. J.* v. *U. S.*, 221 U. S. 1—except in respect to price-fixing which is illegal per se—the courts have employed a "rule of reason" to give a flexibility to the substantive provisions of the antitrust laws and thus adapt them to the distinctive circumstances of specific industries. It just does not make sense to find substantive provisions of federal origin to be flexible, and to hold that procedural devices of state origin and no integral part of the antitrust laws to be rigid standards literally and mechanically to be applied. The need is not for new legislation; the question submitted by petitioner is juridical in character.

In sheer fact, the adverse parties are the advocates of judicial legislation. For they seek to lift state statutes from their instrumental office to the level of the substantive provision and to make them an integral part of the antitrust acts themselves.

3. Respondents' Citation of Cases.—But the distinctive art employed by the respondents in the citation of authority in support of their positions does touch off a conflict in respect to the questions on which the Writ of Certiorari is sought.

A. The Matter of Confusion.—The statement is made by Borax Consolidated (Br. pp. 11, 15-16) and by American Potash (Br. 7-11) that the matter at issue is in no confusion. The single state usually has a number of statutes, none of which has been designed for antitrust use, yet more than one of which can be made to fit. A classic example is *Chattanooga Foundry and Pipe Works* v. *City of Atlanta*, 203 U. S. 390. Here the heart of the holding is not, as American Potash (Br. p. 7) and Borax Consolidated (Br. pp. 11, 12) insist, that the state statute of limitations is absorbed in the federal antitrust laws. It is rather than a judge confronted with a number of such statutes shall be guided by the rule of reason in making a studied choice among them. In that case there was available a federal five-year statute, and state statutes providing for limitations of one, three and ten years respectively. The trial court chose the longest period; and in an opinion of Mr. Justice Holmes was upheld. Any doubt about confusion can be stilled by reading the neatly chiseled opinion of Judge Wyzanski in *Momond* v. *Universal Film Exchange*, 43 F. Supp. 996, where the multiple and diverse laws of two different states, Massachusetts and Oklahoma, entered the same case.

B. The Conflict of Authorities.—In the petition there was set down as a reason for granting the writ a conflict of authority between the decision of the court below and the case of *American Tobacco Company* v. *Peoples Tobacco Company*, 204 Fed. 58, supported by the classic opinion in *Bailey* v. *Glover*, 21 Wallace 342 and the recent decision in *Holmberg* v. *Ambrecht*, 327 U. S. 392. Borax Consolidated attempts to eliminate the conflict by bringing the *Peoples'*

Tobacco case into harmony with the judgment below. In an exposition (Br. pp. 16-17), not uncharacteristic of respondents' way with a case, it employs a rough surgery to subdue the adverse lines of that opinion to its purpose. It recites a sentence from the trial judge's charge to the jury—lifted out of its context—as if it were from the opinion of the circuit court. It notes, correctly enough, the use of "prescription" rather than limitation of action; and, because it is called by another name, assumes that its concern is with another matter. So it sets the ruling down as civil law, having only local validity. This it does in disregard of the fact that the Fifth Circuit is not content to rest its decision upon Louisiana law, but seeks the authority of, and cites the cases from, the general law. The respondents' brief makes the case hold that knowledge of the litigant's damage—in the absence of just such material as Judge Parker held essential to an acceptable complaint—does constitute discovery. The court, with an eye to the use to which knowledge was to be put, in the *Peoples' Tobacco* case, is insistent that discovery must be discovery of "the fact of a combination and conspiracy between (the) parties." And, that there can be no mistake, the court reiterates that to start the running of the statute the discovery by the would-be plaintiff must be of "the facts which would give it a cause of action."

The handling of *Bailey* v. *Glover*, 21 Wallace 342, by American Potash (Br. p. 12) and Borax Consolidated (Br. pp. 13-14), if a bit neater, is equally purposive. In that case the act creating the federal right was supported by a federal statute of limitations. The court there (Borax Consolidated, Br. 13-14) "merely held that every federal statute of limitations is to be read as including a provision that if the cause of action is based on fraud, it does not accrue until discovery"; but "the rule of that case has no application to an action at law under a federal statute not containing its own period of limitations." The matter of fraud will be dealt with in section C just below. Here it is enough to

note that the argument is that when the Congress fixes the limitation it contains a flexible proviso, while where the limitation is left to the caprice of state law it is to be literally and inflexibly applied. It is obvious to any student of this Court that Mr. Justice Miller could never have said anything like that. As a great common-law judge he was far more concerned to give full effect to the reasons supporting a legal principle than to the rigid terms in which for the moment the legislature has embodied it. The application of such statutes must be guided by the purposes they are meant to serve. He recites the reasons which make such limitations on action good law; insists that it is not in accord with justice to deny a man his suit when, with diligence, he has not been able to discover his cause of action; and—allowing his rule to go where its rationale carries it—holds that "the weight of judicial authority, both in this country and in England, is in favor of the application of the rule to suits at law as well as in equity."

The holding of *Holmberg* v. *Ambrecht*, 327 U. S. 392, is handled by Borax Consolidated (Br. 11-12) and American Potash (Br. 7, 8, 9) in the same distinctive way. The *Holmberg* case recites a rule of equity. The case of *Bailey* v. *Glover*, 21 Wallace 342 anticipates the recent breakdown of the older separation of law and equity. And *American Tobacco Company* v. *Peoples Tobacco Co.*, 204 Fed. 58, applies the rule directly to a private suit for triple damages under the antitrust laws. Borax Consolidated (Br. 11, 19) and American Potash (Br. 8, 10) are correct in insisting that *Cope* v. *Anderson*, 331 U. S. 461, does hold a state statute applicable in respect to a federal right (American Potash, Br. 8, 10; Borax Consolidated, Br. 11, 19); but they neglect to state that the court expressly held that the time at which it begins to run presents a federal question. Thus, the line of authority recited by petitioner, in direct conflict with the holding below, invites the issue of the writ asked for.

C. Discovery, Fraud, Fraudulent Concealment.—A man must discover his cause of action before he can bring suit. Fraud or fraudulent concealment stands in the way of such a discovery. In the complaint allegations of fraud are made. (R. 47, 48, 53.) If, as respondents insist they have not yet answered, in respect to the statute of limitations the cause of action must be set down as alleged. At the "special trial" the issue of fraud and fraudulent concealment at best fell only partially within the issue of knowledge or "cause to believe" as put by the trial judge. And at the conclusion of the hearing the court made no findings of fact. The concealment is admitted. Borax Consolidated protests that the respondents did not hold themselves out to be competitors and asserts that what they did was to deny accusations that they were acting in concert. (Borax Consolidated, Br. pp. 5-6.) The confession is confirmed by the fact that, while the conspiracy to capture the world market was under way, Pacific Coast Borax Company, a subsidiary of Borax Consolidated and a respondent, was engaged in litigation over patent infringement with American Potash. (R. pp. 134, 533, 731.)

The facts are not disputed; the questions of fraud and fraudulent concealment are matters not only of law but of federal law. A private antitrust suit, sounding in tort, may involve negligence, conspiracy, deceit, fraud or other like offense. The fraud does not have to be proclaimed from the housetops in order to arrest the running of the statute. As it is put in *Bailey* v. *Glover*, 21 Wallace 342:

> "To hold that by concealing a fraud, or by committing a fraud in a manner which conceals itself until such time as the party committing the fraud could plead the statute of limitations to protect it, is to make the law which was designed to prevent fraud the means by which it is made successful."

And in *American Tobacco Co.* v. *Peoples' Tobacco Co.*, 204 Fed. 58, 62, 63, the court points out that the combina-

tion and conspiracy which had prompted the private suit for triple damages for violation of the antitrust laws

> "was all the time concealed from the plaintiff and this concealment must necessarily be considered as a fraud on the plaintiff."

It would be an anomaly in the law to call the sale of a gold brick to a naive yokel a fraud and yet place without that category a gigantic well-concealed conspiracy in the borax industry to put independents out of business and to rob the public of its access to the free and open market.

4. The Public Interest.—It hardly seems necessary to discuss the contention of Borax Consolidated (Br. pp. 18, 19) that the private litigant in an antitrust action sues for himself, and that the Department of Justice alone can assert the public interest. The contrary has been the law since the Statute of Monopolies—21 Jacobus I, Ch. 3—was enacted in 1623; and the court below, in turning the instant case into an ordinary private tort, disregarded history, the function of the suit and the intent of the Congress. The use of the private suit to serve a public purpose is well established in our system of law. The private antitrust action is a derivation of the old "informer" action. (Compare *Associated Industries* v. *Ickes*, 134 F. (2d) 694, for the analogy in administrative law.) It has been rid of its obloquy by the provision that the litigant sues in respect to an injury to his own business or property. It is the oldest of all antitrust actions, in use long before resort to the plea in equity and the criminal action. Its public purpose is proclaimed on its face. The injured person's damage is not tripled in order to confer on him a windfall, but to give an incentive to bring to the attention of the courts a combination, conspiracy or monopoly whose principal victim is the public. It is a recognition that the Department of Justice, with its limited funds, is inadequate to the task of policing the national economy.

5. Federal Use of State Limitations.—Although state statutes are employed in antitrust cases, the questions attending their use—including which one among several of the same state and when the appropriate statute begins to run—have been generally recognized to be federal in character. *Momond* v. *Universal Film Exchange, Inc.*, 43 F. Supp. 996; *Rawlings* v. *Ray*, 312 U. S. 96; *Cope* v. *Anderson*, 331 U. S. 461. It is this failure to distinguish between the statute which is of state origin and the questions which attend its use which are federal in character that brings a fatal flaw into the arguments which the respondents have put forward.

In the light of the facts, the issues presented and the authorities cited, the court below, in the instant case, with wisdom and justice could have secured the rights of the plaintiffs, could have given effect to the antitrust acts, and could have accorded to the state statute its due by any one of the four following rulings:

A. That the applicable state statute was, as respondents contend, California Code of Civil Practice, Sec. 338(1), and that it should begin to run from the date of the discovery of petitioner's cause of action; or

B. That the applicable state statute was Section 338(4) which is automatically tolled for fraudulent concealment; or

C. That, in its very nature the statute of limitations is a plea in defense; and that because of their fraudulent concealment the respondents were estopped from interposing any such plea; or

D. That, because the facts essential to a just and wise ruling could not be had in advance of the trial on the merits, the court could not in a preliminary hearing rule on the statute of limitations.

It is submitted that the Circuit Court of Appeals was in error in not ruling in terms of these alternatives or of not remanding the matter to the district court with instructions so to rule.

CONCLUSION.

A British and a German corporation, with their subsidiaries, long before 1929 entered into a conspiracy to assert a worldwide dominion over the borax industry. An independent, driven out of business and blocked in every move to return, seeks to assert its rights under the antitrust laws. It had knowledge of its injury and at times had reason to believe that it had been caused by the acts of the respondents. But so successfully had the master plan and the steps in its execution been concealed that, despite diligent effort and an appeal to the Department of Justice, the independent was unable to possess itself of the facts wherewith to "set forth the substance of the agreement in restraint of trade, or the plan or scheme of the conspiracy or the facts constituting the attempt at monopoly." *Alexander Milburn Co.* v. *Union Carbide and Carbon Corp.*, 15 F. (2d) 678. When in 1944 the documents disclosing the whole conspiracy were discovered, and the facts therein were made public in a complaint filed in court by the Department of Justice, the injured independent started its suit. Can it be that the substantive provisions of the antitrust laws which are of federal origin are flexible enough to meet the circumstances of particular cases, and the statutes of limitations, which are imports from state law and necessary to bring the substantive provisions into play, are to be applied with a literal rigidity unknown to the common law? Is the state statute of limitations to be used to strip the independent of his federal rights and to create an immunity for the respondents in their wrong-doing because the resources of the independent were inadequate to the discovery of a secret and closely-guarded conspiracy to possess the world market?

A writ of certiorari should issue, addressed to the United States Court of Appeals for the Ninth Circuit, in order

that, after due and full hearing, this Court may make such rulings as in the premises are wise, just and proper.

Respectfully submitted,

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